

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARBARA L. EVERETT,

Defendant-Appellant.

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UNPUBLISHED

August 9, 2005

No. 253303

Genesee Circuit Court

LC No. 02-011159-FC

Before: Whitbeck, C.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant Barbara Everett appeals as of right from her conviction for second-degree murder<sup>1</sup> for killing a man named Edward White. Everett was sentenced to twenty to fifty years' imprisonment. We affirm. We decide this case without oral argument under MCR 7.214(E).

I. Basic Facts And Procedural History

Everett lived with her boyfriend, Jerome Updite; her father, Eddie Hussey; her father's long-term companion, Gloria Brewer; and Brewer's brother and son. White was a friend of Brewer's son and an occasional visitor to the residence. The incident began on the evening of November 25, 2002, when Brewer and Hussey got into an argument. Both Updite and Everett believed Brewer had hit Hussey in the head with his own cane during the argument, although Brewer denied this. Everett told Brewer to give her the cane, and they began to fight when Brewer refused. Brewer backed into the kitchen to escape Everett, and Everett attempted to stop Brewer from getting a knife. Brewer then hit Everett on the head and ran to a neighbor's house, but the neighbor was not home.

When Brewer returned, Everett and Updite, who was wielding a large iron lamp, confronted her on the front porch. Brewer testified that Everett was hitting her and Updite was pushing the lamp at her, which caused her to fall off the porch. At this point, White, who was walking down the street, saw Brewer fall and came to her aid. White asked Updite why he jumped on Brewer, and as Updite pushed White away, the police arrived on the scene. White told the responding officer that the people in the house had pushed Brewer off the porch. The

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<sup>1</sup> MCL 750.317.

officer testified that White, who did not appear hostile, attempted to confront Updite about assaulting Brewer, but left the scene when asked to do so, as did Brewer. However, both Brewer and White returned to the house shortly thereafter.

When White returned, he appeared angry, and went upstairs to confront Updite. Everett followed White to Updite's room and saw Brewer standing in the doorway and saw White standing over Updite, who was laying on the bed. Everett told White to leave Updite alone. Updite testified that after Everett arrived, he heard Brewer offer White a barber's straight razor. According to Updite, White took the razor and lunged toward Everett with it, at which point Everett stabbed White.

However, Everett's statement to the police indicated that she did not see White with a weapon, and Brewer testified that she did not give White the razor until after Everett stabbed him. Everett told the investigating officer that she approached White with a knife in her hand, again told him to leave, and then reached out and stabbed him once. Everett's statement to the police did not describe any assaultive behavior on White's part, but rather indicated that she stabbed White because he wouldn't leave her room. Brewer testified that she heard White say, "you done stabbed me," and heard Everett say, "I didn't mean to stab him." Everett's statement also indicated that she saw Brewer hand White the razor after she stabbed him.

An autopsy revealed that White was stabbed in the right upper chest, puncturing his aorta. The pathologist testified that White had almost no chance of surviving this wound. White also received a stab wound under his arm that pierced his lung.

## II. Prosecutorial Misconduct

### A. Standard Of Review

We review de novo prosecutorial misconduct claims to determine if the defendant was denied a fair and impartial trial.<sup>2</sup> To the extent Everett's allegations of misconduct are unpreserved, we review them for plain error affecting substantial rights.<sup>3</sup> We will reverse for plain error only if it resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.<sup>4</sup>

### B. The Challenged Comments

Everett argues on appeal that she was denied a fair trial because the prosecutor at several points in his closing argument to the jury characterized Everett's theory of self-defense or defense of others as "fiction," a "fantasy." However, Everett did not timely object to any of these challenged comments. Everett did timely object to the prosecutor's characterization of the

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<sup>2</sup> *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004).

<sup>3</sup> *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

<sup>4</sup> *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

theory of defense as being dishonest, as well as to allegedly improper comments made during the prosecutor's rebuttal closing.<sup>5</sup>

We turn first to the unpreserved claims of prosecutorial misconduct. In his closing argument, the prosecutor stated at several points that the defense attorney had created a "fantasy" defense. The prosecutor may not question defense counsel's veracity or suggest that defense counsel is intentionally trying to mislead the jury.<sup>6</sup> For example, this Court found that prosecutorial misconduct occurred where the prosecutor repeatedly told the jury that the defense was nothing but "damnable lies" and was a "sham meant to mislead you," and also suggested that defense counsel, among other things, actually fabricated physical evidence.<sup>7</sup>

In this case, the contested comments were juxtaposed with a thorough examination of the facts as they related to the crime charged and Everett's theory of self-defense or defense of others. The prosecutor did not call defense counsel a liar, but questioned the validity of Everett's theory of the case given the facts, including Everett's confession. The prosecutor is not required to make an argument in the blandest possible terms.<sup>8</sup> Further, the trial court properly instructed the jury on the burden of proof and explained that the lawyers' statements and arguments are not evidence.<sup>9</sup> Accordingly, Everett has failed to establish that plain error occurred with respect to these comments.<sup>10</sup>

As for Everett's preserved claims of prosecutorial misconduct, Everett cites the following remarks from the prosecutor's argument in rebuttal:

Ladies and gentlemen, I submit to you that the defense attorney is the James Brown of the legal profession, he is the hardest working man in the law. He's got to explain why everyone's wrong and everyone is bad but his client. And the reason he has to work hard is because he has a guilty client. In order to try to make that guilty client look innocent he has to work with these facts that are against him and do the best he can and he is doing a good job, but he cannot escape the window of truth. That short period of time between when this happened and before the wheels started turning in the defendant's mind as to what should I say to try to get away with this.

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<sup>5</sup> See *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). See *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

<sup>6</sup> *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988); *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984).

<sup>7</sup> *Dalessandro*, *supra* at 579.

<sup>8</sup> *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995).

<sup>9</sup> See *People v Long*, 246 Mich App 582, 588; 633 NW2d 842 (2001).

<sup>10</sup> *Carines*, *supra* at 763.

Taken in context, the “window of truth” remark is not a reference to defense counsel’s veracity. Rather, it is a direct reference to the period during which Everett confessed on the night of the killing. The prosecutor was simply arguing that Everett’s confession was more worthy of belief than her story, set forth at trial, of self-defense and defense of others.

We are more troubled by the prosecutor’s statement that defense counsel had to work hard “because he has a guilty client.” While the prosecutor may state that a defendant is guilty of the charged offense if the statement is based on evidence presented at trial,<sup>11</sup> the prosecutor “may not place the prestige of his office behind the assertion that the defendant is guilty,”<sup>12</sup> or suggest that he has some special knowledge unavailable to the jury regarding whether a witness has told the truth.<sup>13</sup> Given the prosecutor’s reference to the fact that defense counsel had to work hard because “the facts are against him,” we believe the prosecutor based his statement on the facts of the case, not the prestige of his office or the existence of special knowledge of Everett’s truthfulness. In any event, the trial court immediately sustained the objection raised, and the prosecutor did not repeat the assertion. We do not believe that this singular instance undermined the fairness of the trial, and therefore we decline to reverse on this ground.

### III. Sentencing Challenge

#### A. Standard Of Review

We review the trial court’s scoring decisions to determine whether the trial court properly exercised its discretion and whether the evidence properly supported a particular score.<sup>14</sup> We will uphold scoring decisions for which there is any evidence in the record.<sup>15</sup>

#### B. OV 9

Everett also argues that the court erred in scoring offense variable (OV) 9. OV 9 requires the trial court to “[c]ount each person who was placed in danger of injury or loss of life as a victim” and assess 10 points if “[t]here were 2 to 9 victims.”<sup>16</sup> Everett received a score of ten points under OV 9. Everett objected to this score on the ground that the evidence did not support the conclusion that there was a victim other than White. However, the testimony established that White and the other identified victim were both in a small room, allowing the parties only a few feet of space to stand, when Everett stabbed the decedent. This evidence supports a finding that the other person was placed in danger, and thus supports the score of ten points under OV 9.

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<sup>11</sup> See *People v Lee*, 212 Mich App 228, 256; 537 NW2d 233 (1995).

<sup>12</sup> *People v Swartz*, 171 Mich App 364, 370; 429 NW2d 905 (1988).

<sup>13</sup> See *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

<sup>14</sup> *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

<sup>15</sup> *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

<sup>16</sup> MCL 777.39.

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald